ARMY CORPS OF ENGINEERS PERMITTING PROCESSES
April 1, 2015

Federal Clean Water Act of 1972 (33 USC 1251 et seq.)

Activities that would result in the discharge of dredged or fill materials into "waters of the U.S." must obtain authorization from the U.S. Army Corps of Engineers (Corps) pursuant to Section 404 of the federal Clean Water Act (CWA) (33 USC 1251 et seq.). This permit is generally referred to as a "404 permit."

A Section 404 permit can take the form of either a General Permit or an Individual Permit. General Permits, which can be structured as Nationwide Permits, Regional General Permits, and Programmatic General Permits, apply to specific classes of activities that have been determined to be capable of causing no more than minimal impact to the aquatic environment (e.g., construction of road crossings, installation of utility lines, and operations and maintenance activities) (33 C.F.R. § 325.5(c)). Individual Permits are designed for activities that have the potential to have more than a minimal effect on jurisdictional waters or that otherwise do not qualify to proceed under a General Permit. The fill that would occur in connection with the proposed project, or project alternatives, would require an Individual Permit.

The process for obtaining an Individual Permit includes: (1) submission of an application to the Corps; (2) a public notice and comment period; (3) coordination with other resource agencies (in accordance with the Endangered Species Act, Historic Preservation Act, and other applicable laws or regulations); (4) state water quality certification; and (5) issuance or denial of the permit. A complete permit application includes the location, purpose and need for the proposed project (along with all reasonably related activities); the purpose of the activities involving the discharge (along with the type and quantity of materials to be discharged); drawings, sketches and plans sufficient for public notice; a schedule of project activities; names and addresses of all adjoining property; locations and dimensions of adjacent structures; and a list of authorizations required by other federal, state, or local agencies for the work (including all approvals and denials already received) (33 CFR § 325.1). Within 15 days of submission of an application, the Corps conducts a preliminary assessment of the application to determine if it is complete, and once the application is complete, the Corps publishes a public notice in the Federal Register (33 CFR §§ 325.2 (a)(2), 325.3). Typically, the public and interested agencies are given 30 days to comment, and the Corps may hold a public hearing on the application. Once public notice is provided, the Corps is required to consult with various agencies prior to permit approval, and to "fully consider" their views in deciding whether to issue a permit (33 CFR § 320.3).

Pursuant to Section 401 of the CWA, states can certify or deny federal permits or licenses that might result in a discharge to "State waters" (33 USC § 1341), and DWR must obtain a "water quality certification" or waiver from the state indicating that the proposed activity complies with all applicable state water quality standards, limitations, and restrictions, before the Corps will issue an Individual Permit. Section 404 grants the Corps principal responsibility to regulate discharges of dredged or fill material into waters of the United States, but the federal EPA retains the right to "veto" a Corps permit (33 U.S.C. § 1344(c)) if the EPA determines, after notice and opportunity for public hearings, that the permitted activity would not comply with the Section 404(b)(1) Guidelines or would have unacceptable adverse impacts on water supplies or

fishing, wildlife or recreation areas (40 CFR § 231.4). But, no affirmative approval is required from the EPA prior to permit issuance.

Substantively, the Corps evaluates applications for Individual Permits for compliance with the Section 404(b)(1) Guidelines (40 CFR Part 230) and the Corps' regulations (33 CFR Part 325) (33 U.S.C. §1344(b)(1)). The Section 404(b)(1) Guidelines contain four main elements: (1) the requirement to identify and analyze project alternatives, and select the alternative that avoids and minimizes impacts to jurisdictional waters to the maximum extent practicable, and is the least environmentally damaging alternative that achieves the overall project purpose (which is often referred to as a 404(b)(1) alternatives analysis); (2) the prohibition against projects that would result in significant degradation of water quality (which typically equates with compliance with state water quality standards pursuant to Section 401 of the CWA); (3) an analysis of the potential environmental impacts and implementation of measures that adequately mitigate for unavoidable impacts; and (4) a "public interest review" that balances the benefits of the project against its potential impacts.

Federal Rivers and Harbors Act of 1899 (33 USC 403 et seq.)

Section 10 of the Rivers and Harbors Act of 1899 (RHA) requires authorization from the Secretary of the Army, acting through the Corps of Engineers, for the construction of any structure in or over any navigable water of the United States (33 USC §403 et seq.; 33 CFR §§ 322 et seq.). Structures or work outside the limits defined for navigable waters of the United States require a Section 10 permit if the structure or work affects the course, location, or condition of the water body" (33 CFR §322.3(a)). The law applies to any dredging or disposal of dredged materials, excavation, filling, rechannelization, or any other modification of a navigable water of the United States, and applies to all structures, from the smallest floating dock to the largest commercial undertaking (33 CFR §322.2(b)).

To construct any structure over or in a navigable waterway or perform any activity that would obstruct a navigable waterway requires a permit from the Corps pursuant to Section 10 of Rivers and Harbors Act, generally referred to as an "RHA permit." Authorization to conduct activities generally prohibited by the RHA can take the form of either a Nationwide, Regional General Permit or an Individual Permit. Certain classes of activities that have only minimal effects are authorized by the Corps on a regional basis. An individual Section 10 permit is required for the proposed activity if it is not covered by a Nationwide General Permit or Regional General Permit (33 CFR § 322.3).

The process for obtaining an RHA permit is similar to the process for obtaining a Section 404 Individual Permit. Substantively, the Corps evaluates applications for Individual RHA Permits for compliance with the Section 404(b)(1) Guidelines (40 CFR § 230) and the Corps' regulations (33 CFR §§ 322 et seq.), and compliance with the 404 permitting criteria will cover the substantive requirements of the RHA permitting process.

Section 14 of the RHA (33 U.S.C. § 408) requires permission from the Secretary of the Army, acting through the Corps of Engineers, to alter an existing Corps of Engineers civil works project. To grant permission under Section 408, the Corps of Engineers must determine that the proposed alteration would not impair the usefulness of the Corps of Engineers project, and would not be injurious to the public interest. This is generally referred to as "Section 408" permission.

To construct a new water conveyance facility and associated mitigation as proposed, the Corps of Engineers facilities potentially altered requiring Section 408 permission are the Sacramento River Flood Control Project (SRFCP), the San Joaquin River Flood Control Project (SJRFCP), and the Stockton Deep Water Ship Channel (Stockton DWSC).

The process for securing Section 408 permission is set forth in the Department of the Army, US Army Corps of Engineers, Circular No. 1165-2-216 (31 July 2014) and includes (1) pre-coordination, (2) written request, (3) required documentation (including environmental compliance, if applicable), (4) district-led Agency Technical Review (ATR), (5) Summary of Findings, (6) division review, (7) headquarters review, (8) notification, and (9) post-permission oversight. Not all the steps will apply to every Section 408 request. In simple cases, steps may be combined or occur simultaneously.

Section 404 and RHA Section 10 Permitting Approach for the Water Conveyance Facility

The Corps and DWR have developed an approach to permitting the construction, operation, and maintenance of a new water conveyance facility pursuant to Section 404 and RHA Section 10. The approach involves the following steps:

- **Preparation and Submission of an Application for Section 404 and RHA Permits**. DWR will submit to the Corps an application for Section 404 and RHA permits covering all components of a new water conveyance facility, including its construction, operation and maintenance. The application will set out detailed information regarding the whole project, in accordance with 33 CFR 325.1(d), including a draft compensatory mitigation plan for unavoidable impacts to waters of the U.S. associated with the entire water conveyance project. The application will also identify project "phases" designed to align the timing of the issuance of Section 404 and RHA permits with the issuance of Section 408 permissions, where such permission is required for specific components of the conveyance project. Certain phases of the project will not trigger a requirement for permission under Section 408 and, for those phases, the Corps may issue Section 404 and RHA Section 10 permits. DWR will determine the project phases for the conveyance facility with the Corps based on such factors as the sequence of construction activities and the location of work sites in relation to facilities under the Corps' Section 408 authority, including federal project levees and federal navigation channels.

- **Application Review**. Once a complete application has been received, the Corps will publish a public notice describing the conveyance facility and its phases as well as the Corps' approach to making permit decisions on those phases pursuant to Section 404 and RHA Section 10, as well as Section 408 permissions where applicable. At this stage of the permitting process, the Corps may initiate consultation under Section 106 of the National Historic Preservation Act and the ESA.

- **Preliminary LEDPA Concurrence**. DWR will submit to the Corps information regarding practicable alternatives for the entirety of the conveyance project, pursuant to the 404(b)(1) Guidelines. The Corps will make a preliminary determination regarding the Least Environmentally Damaging Practicable Alternative ("LEDPA") that meets the overall project purpose of the conveyance project. In its preliminary determination, the Corps will acknowledge the project phases and the related timing of the issuance of

Section 404 and RHA permits and Section 408 permissions.

- **Preliminary Concurrence on the Final Mitigation Plan**. DWR will submit to the Corps a final compensatory mitigation plan that describes the approach by which unavoidable impacts to waters of the U.S. related to the entire water conveyance project will be addressed. The Corps will make a determination regarding the sufficiency of the plan, in accordance with 33 CFR 332.

- **Permit Decision Process**. DWR will submit separate requests to the Corps regarding the issuance of permits under Section 404/RHA Section 10 for each phase of the water conveyance project. For each of those phases, the Corps will issue a separate public notice that includes detailed information regarding the activities that will occur as part of that phase. The Corps will prepare a decision document (EA FONSI or ROD) and will make any necessary additional findings regarding NEPA compliance, the 404(b)(1) analysis, public interest review, and Section 408 permission, if applicable. The processing of the permit application for each phase may occur concurrently or sequentially.

Section 408 Permission Approach for the Water Conveyance Facility

Parallel and coordinated with the Section 404 and RHA Section 10 process, the Corps and DWR have developed an approach for permission for the construction, operation, and maintenance of a new water conveyance facility pursuant to Section 408. The approach involves the following steps.

- **Pre-coordination**. DWR has engaged the Corps in pre-coordination, which has included:
    - Meetings and informal correspondence regarding project purpose and alternatives, other related programs, potentially affected facilities under the Corps' authority, and a preview of the permission process.
    - USACE review of and comment on administrative and public draft environmental documentation.
    - Provision by DWR of hydrology and hydraulic (H&H) system performance analyses prepared for the project for Corps review.
    - Discussion of the relationship between Section 408 and Section 404 and RHA permits, as mentioned above (under "Section 404 and RHA Section 10 Permitting Approach for the Water Conveyance Facility") as a phased approach to align the timing of the issuance of Section 404 and RHA permits with the issuance of Section 408 permissions.
    - Development of a Letter of Intent from the State of California to initiate the Section 408 process with the Corps. This letter is a precursor to the formal Section 408 permission request letter that will come later in the process once more detailed engineering drawings are developed for the relevant project elements. The letters are developed jointly between DWR and the Central Valley Flood Protection Board (CVFPB), who is the recognized by the Corps as the official non-federal sponsor and requester as the party responsible for the operation and maintenance of the federal flood management projects (SRFCP and

SJRFCP). There is a parallel, corollary process between the Port of Stockton and the Corps, recognizing the Port of Stockton's role as the non-federal sponsor and requester responsible for the Stockton DWSC.
  - Development of the review process for each Section 408 permission phase (e.g., need for Safety Assurance Review).

- **Preparation and Submission of Formal Request Letters**. As described above, the pre-coordination task includes development of an approach between DWR and the Corps to determine permit phases pursuant to Section 404, RHA Section 10, and Section 408 permission. Upon development of detailed engineering drawings (to the approximately 65% design level, according to Corps guidance), DWR, acting jointly with the CVFPB, will submit a formal request letter by phase to the Corps for potential alterations to the SRFCP and SJRFCP. In addition to the engineering drawings, the formal request letter will include H&H system performance analysis sufficient to analyze and support the engineering drawings and environmental documentation completed to date. DWR will similarly coordinate with the Port of Stockton for a formal request letter to the Corps for potential alterations to the Stockton DWSC (if required; to be determined through pre-coordination).

- **Permission Decision Process.** The Section 408 permission process will be similar to that described above for Section 404/RHA Section 10, considering the steps specific to Section 408 regarding reviews (e.g., Safety Assurance Review, Agency Technical Review, and Corps Division and Headquarters involvement) to be determined for each phase through the pre-coordination process.

Compliance with Executive Order 11988

In consideration of Section 408 permission, the Corps must demonstrate compliance with Executive Order (EO) 11988. EO 11988 (May 24, 1977) requires a Federal agency, when taking an action, to avoid short- and long-term adverse effects associated with the occupancy and the modification of a floodplain. Federal actions must avoid direct and indirect support of floodplain development whenever there is a reasonable and feasible alternative. If the only reasonable and feasible alternative involves siting in a floodplain, the agency must minimize potential harm to or in the floodplain and explain why the action is proposed in the floodplain.

In February 1978, the Water Resources Council issued Floodplain Management Guidelines for Implementing Executive Order 11988. These guidelines provide analysis of the executive order, definitions of key terms, and an eight-step decision-making process for carrying out the executive order's directives. The process contained in the Water Resources Council guidelines incorporates the basic requirements of the executive order. Briefly, the eight-step process is outlined below, followed by discussion of the project's application of the process to demonstrate compliance.

Step 1: Determine whether a proposed action is in the base floodplain (100-year floodplain, or 1% chance flood, or 500-year floodplain, or 0.2% chance flood, if the action falls under the definition of critical, discussed separately below). The project area for the requester's preferred alternative includes locations on and adjacent to the levees of the Sacramento River (part of the SRFCP), San Joaquin River and Old River (part of the SJRFCP), and Stockton

DWSC. These locations are within the current Federal Emergency Management Agency (FEMA) 100-year floodplain. The water conveyance facilities and levees directly associated with the water conveyance facilities are proposed to be designed and constructed in compliance with the State of California's stated goal of 200-year performance.

The Water Resources Council Floodplain Management Guidelines present the concept of a critical action. While there is no precise definition of critical action, the guidelines (under Part II, Decision-Making Process, Step 1C) outline the parameters and describe a critical action as "any activity for which even a slight chance of flooding is too great." This definition is intended to apply to those federal actions that would involve facilities or infrastructure that are sensitive to flooding and for which the consequences of flooding would be severe in terms of ability to provide essential community services or to reduce risks to life and welfare (as described in the criteria above).

The proposed new water conveyance facilities, which would become part of the State Water Project, would be considered critical due to their function of water supply.for much of California, and would be within the 500-year floodplain the same as existing State Water Project facilities in the region. Specifically, Clifton Court Forebay, Skinner Fish Facility, and the Banks Pumping Plant, to which the new water conveyance facilities would connect, are in the 100-year floodplain. Therefore, for purposes of the analysis required under EO 11988, it is assumed that the project is considered a critical action because the project would be associated with critical facilities already located in the floodplain. However, it should again be noted that the new water conveyance facilities would be built beyond the 200-year level of performance.

Step 2: Provide public review. The CEQA/NEPA process provides for public disclosure; the EIR/EIS is one instrument for public review of the project. DWR and the federal lead agencies have established a multimedia outreach program to allow for public review and disclosure of the project. The approach to the outreach program has been to go beyond the guidelines and requirements of CEQA and NEPA for public noticing to ensure the affected community and other interested stakeholders are informed, engaged, and involved through an accessible, open, and transparent process. Actions conducted as part of the outreach program are listed in Chapter 32, Public Involvement, Consultation, and Coordination.

Step 3: Identify and evaluate reasonable and feasible alternatives to locating in the base floodplain. As stated under the Step 1 discussion, the existing State Water Project facilities, to which the new water conveyance facilities would connect, are located in the 100-year floodplain yet the new facilities would be designed and constructed beyond the 200-year level of performance and would be out of the base floodplain. Underground features (i.e., the tunnels) would be insensitive to surface water hydrology.

Step 4: Identify the effects of the proposed action. This EIR/EIS analyzes the environmental effects potentially resulting from the project per CEQA/NEPA requirements. Review under ESA, CWA, CAA, and other federal and state environmental regulations is also occurring in coordination with the EIR/EIS. In brief, the project may have temporary construction-related effects on traffic and air quality from heavy equipment use, on residents due to noise generation, interruption in utility service and property access, temporary and permanent effects on biological and cultural resources, changes in visual quality and land use, permanent loss of residences and farmland, and effects on navigation. The project's potential effect on flood risk and transference of risk is discussed in Chapter 6, Surface Water, and effects on navigation are summarized in this

appendix.

Step 5: Minimize threats to life and property and to natural and beneficial floodplain values. Restore and preserve natural and beneficial floodplain values. The portions of levees affected by the new water conveyance facilities would be constructed beyond the 200-year level of performance and would therefore would maintain or improve minimization of threats to life and property. The project includes mitigation per state and federal regulations to restore and preserve natural and beneficial floodplain habitat (and therefore natural and beneficial floodplain values).

Step 6: Reevaluate alternatives. This EIR/EIS is part of a step-wise evaluation process to refine the alternatives through public review as well as through resource and regulatory agency input in consultation for compliance with ESA, CESA, and other project authorizations. The alternatives have been evaluated at the planning level for initial screening (Chapter 3) and for re-evaluation through project-level analysis. The recommendations and project refinements resulting from these reviews have been incorporated into the alternative descriptions and environmental commitments (Chapter 3), environmental effects analyses and mitigation measures (Chapters 5 through 30). To date, this level of screening analysis has demonstrated that the requestor's preferred alternative (Alternative 4A) best meets the project purpose and need.

Step 7: Issue findings and a public explanation. To conclude the NEPA process, a record of decision for the Southport project will be publically issued following the Final EIS. To conclude the CEQA process, findings will be publically issued following the Final EIR and prior to project adoption. Public workshops were conducted with the publication of the Draft EIR/EIS, and a public hearing is expected to decide on project adoption by the State of California as an action under CEQA.

Step 8: Implement the action. DWR intends to construct the new water conveyance facilities as soon as possible based on conclusion of the project approval processes, targeted to be initiated in the 2016 construction season.